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UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

NORTHERN DIVISION

In Re: JUNIOR SEBASTIAN HAMMRICH and JOYCE MARIE HAMMRICH, Debtors.	Case No. 87-10032 Chapter 12
JUNIOR SEBASTIAN HAMMRICH and JOYCE MARIE HAMMRICH, Appellants, -vs- A. THOMAS POKELA, Chapter 12 Trustee, Appellee.	CIV 95-1012 MEMORANDUM OPINION AND ORDER

Junior Sebastian Hammrich and Joyce Marie Hammrich, husband and wife (debtors), appeal the decision of the Bankruptcy Court, which conditions discharge in this Chapter 12 proceeding upon debtors' payment to the Trustee the sum of $95,885.86 as net disposable income as of January 1, 1993. This Court has jurisdiction to consider the appeal under 28 U.S.C. § 158(a)(1). For the reasons discussed below, the Court affirms the Bankruptcy Court's Order.

For more than twenty-five years, debtors have conducted a livestock farming operation in northeastern Edmunds County, South Dakota. They maintain a stock cow herd of approximately 225 cows, and they buy calves, feed them, and sell both raised and purchased calves as 700-900 pound yearlings.

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Debtors filed a Chapter 12 petition on January 26, 1987. The Bankruptcy Court confirmed as modified debtors' Amended Chapter 12 Plan on September 26, 1989. The plan took effect in October 1989 and terminated on January 1, 1993. The Amended Plan projected that, for the years 1990, 1991, and 1992, debtors would receive total income in the amount of $292,580.00 and incur expenses in the total amount of $172,000.00, leaving $120,580.00 to apply to debt. The Amended Plan recognized that debtors owed $35,000.43 in administrative claims, $9,265.00 in priority tax claims, $805,893.63 in secured claims, $152,653.59 in undersecured claims, and $44,169.31 in unsecured claims, for a total of $1,046,981.96 in debt. For the benefit of unsecured creditors, debtors promised to pay to the Trustee all net disposable income under 11 U.S.C. § 1225(b)(1)(B) from the effective date of the plan through its termination on January 1, 1993, and then any remaining undersecured and unsecured debt would be deemed paid and satisfied in full.[1]

Debtors' first payment due under the plan on February 1, 1990, was an interest only payment to the First State Bank of Roscoe in the amount of $47,370.40, with a $4,737.04 commission fee to the Trustee, for a total of $52,107.44. Because debtors did not have the cash to make this payment, they borrowed $52,000.00 from Nathan Schaull. From that time forward, debtors made their plan payments, but Joyce Hammrich testified that they were able to do so only by generating cash flow by purchasing heavier weight yearlings at one sale barn and quickly selling them at another sale barn. (Aug. 24, 1994 Hr'g Tr. at 16.) The Bankruptcy Court observed that, as a

[1] 11 U.S.C. § 1225(b)(2) provides:

> For purposes of this subsection, "disposable income" means income which is received by the debtor and which is not reasonably necessary to be expended--
>
> **(A)** for the maintenance or support of the debtor or a dependent of the debtor; or
>
> **(B)** for the payment of expenditures necessary for the continuation, preservation, and operation of the debtor's business.

result of this practice during the three years of the plan, debtors' actual expenses exceeded projected expenses by $444,906.64, and actual income exceeded projected income by $381,377.00, for a net loss. (Addendum to Appellee's Brief, May 11, 1994 Memorandum of Decision at 8-9.) The Bankruptcy Court found that debtors continued the practice in 1993 and that they "earned less than if they had not purchased the extra livestock because the cost of the cattle purchased in 1993 exceeded the extra income by $17,214.85." (Doc. 408, Letter Decision, Dec. 27, 1994 at 9.)

When debtors filed their final report and account on March 11, 1993, the Trustee and Farm Credit Bank of Omaha objected to discharge and sought a disposable income determination. After delays attributed to settlement efforts, the Bankruptcy Court held evidentiary hearings on October 20, 1993, and August 24, 1994.[2] Following the second hearing, debtors submitted income and expense data for 1993 and later responded to the Bankruptcy Court's request for further explanation of that report. (Docs. 405, 407.)

The Bankruptcy Court calculated net disposable income utilizing the formula approved in In re Broken Bow Ranch, Inc., 33 F.3d 1005, 1008-10 (8th Cir. 1994): ending inventory of cash and marketable commodities at termination of the plan less outstanding obligations then due, and then subtraction of the amount of funds needed as carryover to insure the "continuation, preservation, and operation" of the farm and support of debtors' family. Put another way, the formula is expressed as (cash +

[2]The Bankruptcy Court ruled from the bench after the October 1993 hearing that the debtors' farming arrangement with their son did not deplete the estate of disposable income. (Addendum to Appellee's Brief, May 11, 1994 Memorandum of Decision at 2.) Although the Trustee discusses this issue at length in his brief, the Trustee did not file a cross-appeal to challenge the Bankruptcy Court's finding, and this Court does not need to review the finding to affirm the Bankruptcy Court on the disposable income issue.

marketable commodities - current expenses) - carryover funds = disposable income.

Based upon debtors' Revised Exhibit "B," which was presented at the August 1994 hearing, and debtors' written closing arguments filed following the October 1993 hearing, the Bankruptcy Court found that, as of termination of the plan on January 1, 1993, debtors had $29,200.00 in cash on hand ($30,000.00 less exempt cash of $800.00). Debtors listed their marketable livestock on Revised Exhibit "B" as $112,452.00, but the Bankruptcy Court found that this figure represented only debtors' yearlings and cull cows and bulls that debtors actually sold in early 1993. The Bankruptcy Court found that the figure failed to recognize the December 31, 1992 present value of debtors' other livestock, "specifically the weanlings from Debtors' 1992 calf crop, calves of various ages purchased during 1991 or 1992 and not sold yet, and other cull cows and bulls." (Doc. 408, Letter Decision at 7.) The Bankruptcy Court found that the animals had some market value as of January 1, 1993, that must be included in the disposable income calculation, even though debtors could sell these animals later in 1993 or 1994 for more money. Debtors' bred cows, herd bulls, and calves to be born in 1993 were not considered marketable livestock to be valued as of December 31, 1992. Based upon the evidence presented, the Bankruptcy Court found that debtors had marketable livestock worth $236,332.00 as of January 1, 1993. This included the $112,452.00 debtors' claimed they had, as well as 326 additional calves valued at $380.00 each for a total of $123,800.00. The Bankruptcy Court found that total cash and marketable commodities amounted to $281,601.00 ($29,200.00 cash + $236,332.00 marketable livestock + $16,069.00 for 1992 government farm program payments received in 1993). From this amount, the Bankruptcy Court deducted current expenses as of January 1, 1993, in the amount of $16,980.00, as shown on debtors' Revised Exhibit "B."[3]

Next, the Bankruptcy Court had to determine the amount of carryover funds necessary to permit continuation and preservation of debtors' livestock operation and family support. The Bankruptcy Court found that the bankruptcy estate benefited little, if at all, from debtors' "expanded" post-confirmation livestock operation, and therefore, debtors would not be allowed carryover funds sufficient to continue the "expanded" operation. The Bankruptcy Court limited the debtors to their projected operating expenses of $172,000.00, as stated in the Amended Plan. Because debtors failed to show clearly when they receive income and accrue expenses in a typical year, the Bankruptcy Court estimated that debtors could expect to receive income of $100,092.86 in 1993 ($40,267.21 in government payments, $2,966.67 in dividends, miscellaneous income of $13,461.26, $3,397.72 from grain and hay, and $40,000 in increase in the value of the 326 head of livestock valued as of January 1, 1993, but sold later in 1993). The Bankruptcy Court calculated debtors' 1993 expenses at $268,828.00 ($172,000 for operating and living expenses, $70,182.00 to First State Bank of Roscoe, $646.00 to School and Public Lands, and $26,000 to Farm Credit Bank of Omaha). Thus, the allowed carryover funds amounted to $168,735.14. The court ruled that debtors could seek outside financing for any "expanded" operation, although the court did not find debtors to be good candidates for financing because their business depends upon market speculation, debtors had been unable to repay the $52,000 Schaull operating loan, and the livestock operation failed to yield clear profit over several years.

Finally, the Bankruptcy Court determined that it should not estimate any decrease in disposable income during the plan caused

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[3]These expenses included $3,115.00 to Ipswich Farmers Elevator, $2,536.00 to Ipswich Farmers Ampride, $791.00 for repairs and supplies, $228.00 for veterinary care, $2,400.00 for rent, $573.00 for utilities, and $7,337.00 to Peterson Stack Moving.

by debtors' "expanded" operation and order it paid to unsecured creditors as disposable income because the creditors and the Trustee did not question debtors' excessive expenses during the plan term, even though debtors filed "better-than-average monthly and annual reports with the Trustee[.]" (Doc. 408, Letter Decision at 12.) The Bankruptcy Court found that there was no way to accurately measure what amount unsecured creditors might have received as disposable income if debtors' expenses had stayed within the projected limits set out in the Amended Plan, and there was no evidence that debtors expanded the operation to avoid payments to creditors. Thus, based upon the Broken Bow Ranch analysis, the Bankruptcy Court held that debtors must pay to the Trustee $95,885.86 in disposable income (marketable assets of $281,601.00 less current expenses of $16,980.00 and allowed carryover funds of $168,735.14) before discharge will be granted.

This Court must review the Bankruptcy Court's factual findings for clear error and its legal conclusions de novo. Wegner v. Grunewaldt, 821 F.2d 1317, 1320 (8th Cir. 1987). This Court may not make its own factual findings, see In Re Euerle Farms, Inc., 861 F.2d 1089, 1090 (8th Cir. 1988), and the Court may not reverse because it would have decided the case differently. Adams v. Zentz, 963 F.2d 197, 200 (8th Cir. 1992). "The determination of what constitutes disposable income is a fact-intensive inquiry into whether debtor has 'income which is in excess of that reasonably required for maintenance and continuation of [its] farming operation from one year to the next.'" In Re Broken Bow Ranch, 33 F.3d at 1008 (quoted case omitted).

Although debtors set out nine separate issues in their brief, they concede that these issues dovetail into one central argument--the Bankruptcy Court's findings are clearly erroneous because the evidence is insufficient to support them and the Bankruptcy Court's legal conclusions are wrong as a matter of law. (Appellants' Brief at 9.) The Court has carefully reviewed the record in this matter, and on the entire evidence, the Court is not left with a definite and firm conviction that a mistake has been made. See Adams, 963 F.2d at 200.

Debtors argue that the Bankruptcy Court erred in assigning a market value to 326 head of calves that debtors had on hand as of December 31, 1992. Debtors concede, however, that the calves had some value and could be sold as of January 1, 1993, even though they were not ready for market. (Appellants' Brief at 21.) The Bankruptcy Court did not clearly err in assigning a market value to these calves as of the end of the plan period and including them in the disposable income analysis.

Debtors argue that the Bankruptcy Court erred in including government payments received in 1993 as income in 1992. The Bankruptcy Court asked the debtors following the August 1994 hearing to clarify their receipt of government payments in 1993. Debtors provided a list of "Government Program Income" that listed three payments from ASC in the amounts of $3,639.00, $2,503.00, and $9,927.00, and two payments from CRP in the amounts of $20,506.00 and $688.00. (Doc. 407.) Because debtors did not provide evidence to show when these payments were received and for what crop year, the Bankruptcy Court found that it could only conclude the ASC payments arose from debtors' 1992 crop year. (Doc. 408, Letter Decision at n.3.) The Bankruptcy Court stated it would permit debtors to show the Trustee that these amounts were from the 1993 crop year and, if so, the amounts will be deducted from the disposable income calculation. (Id.) This argument does not justify overturning the Bankruptcy Court's Order.

Debtors argue that the Bankruptcy Court erred when it included the Nathan Schaull loan in the amount of $52,000.00 as income during the plan period but did not include the loan as an offsetting expense during the plan period. Joyce Hammrich testified that the debtors had not told Schaull when the loan would be repaid. (August 24, 1994 Hr'g Tr. at 17.) Because the loan was not due on January 1, 1993, it was not a current expense to be included in the disposable income calculation. See In Re Broken Bow Ranch, 33 F.3d at 1009.

Finally, as to determining carryover funds, debtors argue that the Bankruptcy Court clearly erred in finding that they conducted an "expanded" cattle operation during and after termination of the plan. The evidence presented leaves no doubt that debtors engaged in the buying and selling of cattle far beyond what was projected in their Amended Plan. The Bankruptcy Court's findings in this regard are not clearly erroneous. There is no indication in this record that debtors ever sought to modify their plan to take into consideration the hardships they experienced because of rising feed costs, drought, and machinery repairs. Debtors concede that they ended their plan with less than they had at the beginning. (Appellants' Brief at 14, 15.) As the Bankruptcy Court observed, the Trustee and the creditors failed to question why debtors' expenses skyrocketed beyond the projected figures in the Amended Plan. Because of the losses to the estate over the plan term, the Bankruptcy Court did not clearly err in finding that carryover funds should be determined based upon the debtors' projected operating and living expense. The Bankruptcy Court was careful to protect debtors' "fresh start" by providing adequate carryover funds without requiring debtors to seek financing for their regular operating expense, albeit at their previous operating levels, not at the expanded level at which they subsequently operated.

The Bankruptcy Court performed a thorough analysis of the disposable income issue and made a carefully considered decision. This Court determines that there is no clear error in the Bankruptcy Court's finding that debtors must pay $95,885.86 in disposable income to the Trustee before discharge may be entered. Accordingly, IT IS ORDERED that the Bankruptcy Court's Order Determining Net Disposable Income is affirmed.

Dated this 7th day of December, 1995.

BY THE COURT:

Lawrence L. Piersol
United States District Judge

ATTEST:
WILLIAM F. CLAYTON, CLERK
BY: Deleen Martini
DEPUTY

(SEAL)